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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WORLD MIX ENTERTAINMENT, LTD., a corporation,)	Case No. CV 07-02159 DDP (Ex)
)	
Plaintiff,)	
)	ORDER GRANTING MOTION FOR PARTIAL
v.)	SUMMARY JUDGMENT
)	
BONE THUGS HARMONY, INC., a)	[Motion filed on January 2, 2009]
corporation; BONE THUGS N)	
HARMONY RECORDS, INC.; a)	
corporation; ANTHONY CHARLES)	
HENDERSON, an individual;)	
CHARLES CURTIS SCRUGGS, JR.,)	
an individual; STEVEN)	
VERDELL HOWSE, an)	
individual; JAIME JOSEPH)	
ADLER, an individual ,)	
)	
Defendants.)	
_____)	

I. BACKGROUND

A. Procedural Background

On April 2, 2007, Plaintiff World Mix Entertainment, Ltd.
("World Mix"), a Japanese corporation, filed an action for breach
of a performance contract (the "World Mix Contract") against the
three individual members of the musical recording and performance
group Bone Thugs-n-Harmony ("Bone Thugs Group"), their "booking

1 agent" Jamie Adler ("Adler"), Bone Thugs-n-Harmony, Inc., and Bone
2 Thugs-n-Harmony Records, Inc.¹

3 The individual members of the Bone Thugs Group are Steven V.
4 Howse (professionally known as "Layzie Bone"), Charles C. Scruggs,
5 Jr. (professionally known as "Wish Bone"), and Anthony C. Henderson
6 (professionally known as "Krayzie Bone"). (Hori Decl. ¶ 2.) All
7 three members failed to appear in the action as defendants and
8 default judgments were entered against them on February 28, 2008 in
9 the amount of \$205,510.14. (Mot. 2:13-17.)

10 In May 2008, Defendant Henderson ("Henderson") filed a motion
11 pursuant to Federal Rule of Civil Procedure 60(b) to set aside the
12 default judgment as to himself. (Mot. 2:18-20.) The motion was
13 granted on June 27, 2008. (Id. at 2:20.) Henderson filed an
14 Answer in which he denied that he was bound by the performance
15 contract with World Mix, and also filed a Cross-Complaint against
16 Adler seeking indemnity. (Mot. 2:21-23.)

17 World Mix now moves for partial summary judgment against
18 Henderson.

19 B. Background of the Dispute

20 World Mix promotes concerts in Japan, and its primary focus is
21 to retain and arrange performances by American acts, especially rap
22 and hip-hop artists. (Hori Decl. ¶ 2.)

23 In September 2006, World Mix entered into negotiations with
24 Adler for the Bone Thugs Group to perform a concert tour in Japan.
25 (Statement of Uncontroverted Facts ("SUF") ¶ 5.) The parties

26
27 ¹ World Mix concedes it failed to serve a summons or Complaint
28 on the two Bone Thugs corporations, which it now alleges have no
connection with this suit. (Mot. 2 n.1.) Defendant Henderson does
not contest this issue.

1 dispute Adler's authority to bind Henderson and the Bone Thugs
2 Group. However, on October 5, 2006, Adler and Shinichiro Hori
3 ("Hori"), President of World Mix, signed a performance contract
4 agreeing that the Bone Thugs Group would perform in Japan on
5 December 8 and 9, 2006 and provide a related "modeling shoot."
6 (SUF ¶ 5; Hori Decl. ¶ 3 Ex. A.) In exchange, the contract
7 provided payment of \$60,000 (\$25,000 for each show and \$10,000 for
8 the modeling shoot), three business class flights and four coach
9 flights, and seven hotel rooms. (SUF ¶ 7; Hori Decl. ¶ 4 Ex. A.)
10 A 50% deposit of \$30,000 was to be paid by World Mix to The Adler
11 Booking Agency no later than October 10, 2006, with the remaining
12 \$30,000 due before the Bone Thugs Group left the United States for
13 Japan. (SUF ¶ 7; Hori Decl. ¶ 4 Ex. A.)

14 On October 12, 2006, two days after the requisite date for
15 payment, World Mix wired \$25,000 to The Adler Booking Agency, which
16 was \$5,000 less than the amount stated on the contract. (SUF ¶ 9;
17 Hori Decl. ¶ 6 Ex. B.) However, Adler sent an e-mail to World Mix
18 on October 23, 2006 confirming the deposit and stating, "This
19 letter states that bone thugs received the deposit for the shows in
20 [J]apan. The deposit was \$25,000." (SUF ¶ 10; Hori Decl. Ex. B.)

21 In the months before the tour dates, World Mix kept in
22 "regular contact" with the Bone Thugs Group through Adler and the
23 group's manager, Steve Lobel ("Lobel"), in order to work out
24 various logistical details. (SUF ¶ 12.) For example, a copy of
25 each band member's passport was forwarded to World Mix, including
26 Henderson's. (SUF ¶ 12; see Hori Decl. Ex. D.)

27 On December 6, 2006, Adler, Lobel, and band-member Howse
28 showed up at the Los Angeles International Airport. (SUF ¶¶ 13-14;

1 Mot. 5:1-3; Hori Decl. ¶ 11.) Although Adler, Lobel, and Howse
2 waited until their plane flight had left, Henderson and Scruggs
3 never arrived. (SUF ¶ 14; Hori Decl. ¶ 11.) Thereafter, the
4 December concerts in Japan were cancelled, and thousands of advance
5 ticket sales were refunded. (Id.)

6 In his declaration, Henderson states that Adler did not have
7 the authority to enter into the contract without Defendant's
8 consent, that he told Adler he would be unable to perform on the
9 scheduled dates, and that he was unaware of the World Mix Contract
10 until this litigation was filed. (Henderson Decl. ¶ 3, 5; Supp.
11 Resp. to Interrogs. Set One 7:1-5.)

12 **II. LEGAL STANDARD**

13 Summary judgment is appropriate where "the pleadings, the
14 discovery and disclosure materials on file, and any affidavits show
15 that there is no genuine issue as to any material fact and that the
16 movant is entitled to a judgment as a matter of law." Fed. R. Civ.
17 P. 56(c). A genuine issue exists if "the evidence is such that a
18 reasonable jury could return a verdict for the nonmoving party,"
19 and material facts are those "that might affect the outcome of the
20 suit under the governing law." Anderson v. Liberty Lobby, Inc.,
21 477 U.S. 242, 248 (1986). On a motion for summary judgment, all
22 justifiable inferences from the evidence must be drawn in favor of
23 the nonmoving party. Anderson, 477 U.S. 242, 255 (1986). However,
24 no genuine issue of fact exists "[w]here the record taken as a
25 whole could not lead a rational trier of fact to find for the non-
26 moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
27 475 U.S. 574, 587 (1986). The existence of merely a "scintilla of
28 evidence in support of the non-moving party's position is not

sufficient." Triton Energy Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th Cir. 1995) (citing Anderson, 477 U.S. at 252).

III. DISCUSSION²

A. Agency Relationship

An agency relationship may be either "actual" or "ostensible."³ Cal. Civ. Code § 2298. If an agent acts within the scope of his actual or ostensible authority, all rights and liabilities that accrue to the agent in transactions will also accrue to the agent's principal. Cal. Civ. Code § 2330; see also Cal. Civ. Code § 2318 ("Every agent has actually such authority as is defined by this Title, unless specifically deprived thereof by his principal, and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon his authority.")

1. Actual Authority

The parties dispute whether Adler possessed actual authority to bind Henderson to the performance contract. "[A]gency is actual when the agent is really employed by the principal." Cal. Civ. Code § 2299. However, an agency relationship is not created where the agent is an "independent contractor." Although "[t]he right to control the result is inherent in both independent contractor relationships and principal-agency relationships; it is the right

² The Court has diversity jurisdiction in this case, and the contract dispute between the parties is governed by California law. See Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008).

³ "Many courts use the terms ostensible agency, apparent agency, apparent authority, and agency by estoppel interchangeably. As a practical matter, there is no distinction among them." Armato v. Baden, 71 Cal. App. 4th 885, 897 n.4 (Cal. Ct. App. 1999) (citation omitted).

1 to control the means and manner in which the result is achieved
2 that is significant in determining whether a principal-agency
3 relationship exists." Wickham v. Southland Corp., 168 Cal. App. 3d
4 49, 59 (Cal. App. 4th Dist. 1985)

5 The parties dispute whether Adler is an independent contractor
6 or an employee. (Henderson Decl. ¶ 7.) According to Henderson,
7 Adler did not have actual authority to accept offers on his behalf
8 without his authorization and consent. (See Henderson Decl. ¶¶ 5-
9 6.) Adler only had authority to "receive offers on behalf of the
10 Group and present them to the Group." (Henderson Decl. ¶ 7; Opp'n
11 to SUF ¶ 4.) Furthermore, there is evidence that Henderson used
12 ordinary care to convey his instructions regarding the World Mix
13 Contract to Adler. Henderson states that he specifically told
14 Adler that he had a "mandatory" court appearance and could not
15 appear on the dates for the performance in Japan; and Henderson
16 submitted evidence of a court appearance set for December 8, 2006.
17 (Henderson Decl. ¶ 3.)

18 However, actual authority may also be created if the
19 principal intentionally or, by want of ordinary care, allows the
20 agent to believe that authority is conferred. Cal. Civ. Code §
21 2316. It is undisputed Adler signed a contract which purports to
22 bind the Bone Thugs Group, of which Henderson is a band-member, and
23 represented to World Mix that the Bone Thugs Group had agreed to
24 the World Mix Contract.⁴ (SUF ¶¶ 5-6.)

27 ⁴ Henderson also does not dispute that the contract's
28 reference to the Bone Thugs Group refers to him and his two band-
members.

1 Therefore, the Court finds that there is a genuine issue of
2 material fact as to whether Adler had actual authority to bind
3 Henderson to the World Mix Contract.

4 2. Apparent or Ostensible Authority

5 Ostensible authority exists where a principal, "intentionally
6 or by want of ordinary care," causes or permits a third party to
7 believe that the agent possesses authority to act in a certain
8 manner. Cal. Civ. Code §§ 2317, 2300. "Ostensible authority must
9 be based on the acts or declarations of the principal and not
10 solely upon the agent's conduct." Taylor v. Roseville Toyota,
11 Inc., 138 Cal. App. 4th 994, 1005 (Cal. Ct. App. 2006)(citing
12 Kaplan v. Caldwell Banker Residential Affiliates, Inc., 59 Cal.
13 App. 4th 741, 747 (Cal. Ct. App. 1997)). Explicit representations
14 by the principal to the third party, however, are not required to
15 find ostensible authority. C.A.R. Transp. Brokerage Co., Inc. v.
16 Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir. 2000).

17 [O]stensible authority may be proven through evidence of the
18 principal transacting business solely through the agent, the
19 principal knowing that the agent holds himself out as clothed
20 with certain authority but remaining silent, the principal's
representations to the public in general, and the customs and
usages of the particular trade in question.

21 Id. (internal citations omitted).

22 The undisputed evidence shows that: 1) Adler signed the World
23 Mix Contract, purportedly on behalf of the Bone Thugs Group, of
24 which Henderson is a member; 2) a copy of Henderson's passport was
25 forwarded to World Mix; 3) World Mix's representatives kept in
26 regular contact with Adler and Lobel to plan logistics during the
27 two months before the scheduled trip; and 4) Adler, Lobel, and
28 band-member Howse showed up at the airport on December 6, 2006, and

1 waited for Henderson and Scruggs to arrive until after the plane
2 departed, and then left the airport themselves without going to
3 Japan. All of these events suggest that Adler had ostensible
4 authority to bind Henderson to the contract.

5 On the other hand, only one band-member showed up at the
6 airport to leave for Japan, which is circumstantial evidence of
7 some miscommunication or that Adler did not possess, at least,
8 actual authority to bind the Bone Thugs Group. However, even
9 viewed in the light most favorable to Henderson, no reasonable
10 trier of fact could find that the above series of events was not
11 prompted by Adler's ostensible authority as the Bone Thugs Group's
12 booking agent. Henderson states that Adler was one of several
13 individuals authorized to receive offers from third parties for
14 personal appearances of the Bone Thugs Group, and that he was not
15 aware of the World Mix Contract until this litigation began.
16 (Henderson Decl. ¶ 3, 11.) However, while Henderson himself was
17 aware of Adler's limited authority, he has not presented any
18 evidence raising a genuine dispute of material fact that anyone
19 else had been informed of this limit.⁵ A principal cannot escape
20 liability by hiding behind an undisclosed limitation on its agent's
21 authority. See Myers v. Stephens, 233 Cal. App. 2d 104, 115 (Cal.
22 Ct. App. 1965) ("[I]f a principal clothes his agent with
23 [ostensible] authority, a person dealing with the agent, in the
24 absence of any conduct on the part of either principal or agent
25 warranting inquiry, is entitled to rely upon that apparent

27 ⁵ The term "booking agent" itself, which Henderson has used to
28 describe Adler's role (see Cross-compl. ¶ 28), does not overtly
suggest any limits on Adler's agency.

1 authority and is not bound by undisclosed limitations.") Henderson
2 himself never communicated Adler's limited authority to World Mix,
3 and provides no other evidence to support his argument. (Cohen
4 Decl. Ex. B. "Supp. Rog. Responses" 7:22-24.)

5 Generally, under California law, ostensible authority is for
6 the trier of fact to resolve rather than by an order granting
7 summary judgment. Krieger, 181 F.3d at 1121 (citing Thompson v.
8 Occidental Life Ins. Co., 276 Cal. App. 2d 559, 564 (Cal. Ct. App.
9 1969)). If the moving party meets its burden to show that there
10 are no genuine issues of material fact, however, the nonmoving
11 party must then present "significant probative evidence to support
12 its claim or defense." Intel Corp. v. Hartford Accident & Indem.
13 Co., 952 F.2d 1551, 1558 (9th Cir. 1991) (citing Richards v.
14 Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987)). If the
15 nonmoving party presents evidence that is "merely colorable," a
16 motion for summary judgment may not be defeated. Anderson, 477
17 U.S. at 249-50.

18 Again, while Henderson directly denies Adler's actual
19 authority, Henderson fails to present evidence that creates a
20 genuine dispute as to whether Adler possessed ostensible authority.
21 Henderson's rebuttal of actual authority, by itself, is not enough
22 to raise a material question of fact as to ostensible authority.
23 See C.A.R. Transp. Brokerage Co., 213 F.3d at 481 (affidavit by
24 nonmoving party contesting actual authority was not sufficiently
25 probative evidence to defeat a motion for summary judgment based on
26 ostensible authority).

1 As there is no genuine dispute of material fact, the Court
2 finds that Adler had ostensible authority to bind Henderson to the
3 World Mix Contract.

4 B. Breach of Contract Claim

5 1. Cancellation Clause

6 The World Mix Contract has a clause stating the following:

7 IF PAYMENTS ARE NOT MADE ON TIME CONTRACT WILL BE CANCELLED
8 AND BUYER WILL BE REQUIRED TO PAY 50% OF THE AGREED AMOUNT FOR
9 COMPENSATION

10 (Hori Decl. Ex. A.) Henderson argues that this clause excuses him
11 from performance, because World Mix made its payment two days late
12 and the payment was \$5,000 less than the amount indicated in the
13 contract. (See SUF ¶ 9; Hori Decl. ¶ 6 Ex. B.)

14 Accepting a late or insufficient payment is an affirmation of
15 the contract, and the right to rescind the contract for material
16 breach may be waived by this conduct. Leiter v. Eltinge, 246 Cal.
17 App. 2d 306, 317 (Cal. Ct. App. 1966). Adler's later conduct thus
18 treated the contract as "alive and viable." Id. World Mix's
19 payment was confirmed by an e-mail from Adler acknowledging its
20 receipt, where he did not protest the late or insufficient payment.
21 (SUF ¶ 10.) After the purported breach of contract by World Mix,
22 Adler and Lobel also remained in regular contact with World Mix
23 until the scheduled trip. (SUF ¶ 12.) The acceptance of the
24 contract was further ratified by the arrival of Adler, Lobel, and
25 band-member Howse at the airport on December 6, 2006. (See SUF ¶¶
26 13-14; Mot. 5:1-3; Hori Decl. ¶ 11.)

27 As there is no genuine dispute as to whether the contract was
28 affirmed by Adler's conduct, despite any breach by World Mix, the

1 Court finds that Adler waived the right to assert breach on behalf
2 of Henderson.

3 2. Force Majeure Clause

4 Henderson argues he is excused from performance by the force
5 majeure clause of the World Mix Contract. The force majeure clause
6 states:

7 If Artist shall be unable for any reason outside his control
8 to attend the engagement, Artist shall not be required to
9 perform, in which instance, any moneys paid by Purchaser shall
10 be returned and neither party to this agreement shall be under
11 any further obligation to each other. In the event of civil
disorder and the likes of which could result in damage to like
or property, Artist in his sole judgment, shall have the right
to terminate this agreement without liability.

12 (Hori Decl. Ex. A ¶ 13.) Generally, a force majeure occurs when
13 "there [is] such an insuperable interference occurring without the
14 parties' intervention as could not have been prevented by exercise
15 of prudence, diligence, and care." (Horsemen's Benevolent &
16 Protective Ass'n v. Valley Racing Ass'n, 4 Cal. App. 4th 1538,
17 1564-65 (Cal. Ct. App. 1992)(quoting Pacific Vegetable Oil Corp. v.
18 C.S.T., Ltd., 29 Cal.2d 228, 238 (Cal. 1946)). The clause at issue
19 here similarly states that the causing event must be "outside
20 [Henderson's] control." (Hori Decl. Ex. A ¶ 13.)

21 Henderson argues that he was unable to perform the World Mix
22 Contract because he had been ordered by a California Superior Court
23 to "surrender himself to the Contra Costa County Sheriff in
24 department 52 of this court on December 8, 2006 at 1:30 P.M."

25 (Henderson Decl. Ex. A.) However, the Superior Court order
26 indicates that December 8 had been chosen due to a schedule
27 modification initiated by Henderson. (See Henderson Decl. Ex. A
28 ("The ex parte motion of respondent [Henderson] to modify the order

1 requiring [Henderson] to surrender himself to the Contra Costa
2 County Sheriff on October 6, 2006 is granted due to the pending
3 birth of his child").) In other words, the court date in
4 the order was not outside of Henderson's control; rather, it was a
5 direct result of Henderson's control. See Webster v. Southern
6 California First Nat. Bank, 68 Cal. App. 3d 407, 415-16 (Cal. Ct.
7 App. 1977)(finding that a court order obtained by a private
8 litigant did not make performance impossible).

9 As Henderson has provided the Court with no evidence of events
10 outside his control, there is no genuine issue of material fact.
11 The Court finds that Henderson's performance of the World Mix
12 Contract was not excused.

13 **IV. CONCLUSION**

14 For the foregoing reasons, the Court GRANTS the motion for
15 partial summary judgment and finds that Henderson is bound by the
16 World Mix Contract and liable as a matter of law for its breach.

17 Additionally, as World Mix concedes that it never served the
18 corporations Bone Thugs N Harmony, Inc. and Bone Thugs N Harmony
19 Records, Inc. with a complaint or summons, and that these companies
20 do not have any connection with this suit, the Court DISMISSES them
21 as defendants.

22
23 IT IS SO ORDERED.

24
25
26 Dated: March 3, 2009


DEAN D. PREGERSON

28 United States District Judge